In the

Supreme Court of the United States

October Term, 1977

No. 77-450

LARRY PRESSLER,
Appellant,

vs.

W. M. BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal from the United States District
Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

Counsel for Appellee
Kenneth R. Harding

November 16, 1977

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

In the

Supreme Court of the United States

October Term, 1977

No. 77-450

LARRY PRESSLER,
Appellant,

vs.

W. M. BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal from the United States District
Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM

The appellee Kenneth R. Harding, Sergeant-at-Arms of the United States House of Representatives, respectfully moves this Court to dismiss or affirm the judgment of the United States District Court for the District of Columbia (a three-judge court) entered on July 19, 1977, which judgment reinstated a prior judgment dated October 12, 1976, and reported at 428 F. Supp. 302.

QUESTIONS PRESENTED

1. Whether the appellant, as a sitting Member of the House of Representatives, has standing before this Court to challenge the constitutionality of the procedures established in the Federal Salary Act of 1967 and in the Executive Salary Cost-of-Living Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether a constitutional challenge to the method chosen by Congress to ascertain the compensation to be received by Senators and Representatives, pursuant to Article I, Section 6, raises a political and nonjusticiable question that has been textually and totally committed by the Constitution to Congress.

3. Whether, in execution of its power under Article I, Section 6, to ascertain Congressional compensation "by Law," Congress can ascertain such compensation only through enactment of specific legislation, or whether the necessary and proper clause of Article I, Section 8, gives Congress discretion to ascertain such compensation through other legislative modes.

STATEMENT OF THE CASE

The District Court's opinion at 428 F. Supp. 302 (J.S. App. 3a-10a) contains a complete and accurate summary of appellant's contentions and the purported bases therefor. The jurisdictional statement now before the Court is virtually identical, in content and argument, to appellant's jurisdictional statement submitted on the prior appeal to this Court, No. 76-1005. The only new factor discussed by appellant concerns the Bartlett amendment

to §225(i) of the Salary Act (adopted on April 4, 1977), by which the so-called "one-House veto" device was excised from the Act. See J.S.5. It was that amendment that caused this Court, on the earlier appeal, to remand this case to the three-judge District Court to consider what effect the amendment had upon appellant's claims. The District Court found that it had no effect and accordingly reinstated its former judgment and opinion. J.S. App. 1a-2a.

In view of the full statements now and previously before the Court concerning the basic facts and contentions, it suffices to say here that this case involves but one basic overriding claim – an attempt by a sitting Member of the House of Representatives to challenge the wisdom and the votes of his Congressional colleagues in enacting legislation that secures Executive assistance and recommendations in ascertaining what compensation Congressmen should receive in an era of growing costs of living.

MOTION TO DISMISS

The appellee Harding hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution. The nonjusticiability of this appeal is obvious from two standpoints: (1) the appellant lacks standing to process this appeal; and (2) the appeal presents only questions that are political in nature and hence beyond the scope of judicial review. As was said in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974), "either the absence of standing or the presence of a political question suffices to prevent the power of the judiciary from being invoked by the complaining party."

(1) **Appellant's lack of standing.** As the District Court held (J.S.App. 6a), appellant lacks standing as a citizen and taxpayer to assert his "generalized grievances" as to the methods of increasing Congressional compensation. *Richardson v. Kennedy*, 401 U.S. 901 (1971), affirming 313 F.Supp. 1282 (W.D. Pa. 1970). It would appear equally true that he lacks standing as a Congressman to assert such grievances.[1] Stripped to essentials, his grievance is simply that he and his colleagues in Congress should be compelled to cast roll call votes on legislation designed to establish Congressional compensation levels rather than to sit silently while adjustments and increases are effectuated automatically or through Presidential recommendations – all pursuant to existing legislation on which roll call votes were taken. In short, appellant is attempting "to interfere with the internal workings of the Congress itself" (J.S.App. 6a), which the District Court conceded would take his case out of the realm of judicial cognizability.

Moreover, no provision of the Constitution mandates that each and every compensation proposal be subjected to roll call votes or to the full legislative process. Nor does any provision of the Salary Act or the Adjustment Act, or the actions of the appellees thereunder, preclude the appellant from introducing and voting on any legislation to change the legislative mode of ascertaining Congres-

[1] The District Court's contrary ruling as to standing is no bar to reconsideration of the matter as a condition to the exercise of this Court's appellate jurisdiction. Standing, like other "case or controversy" elements, "must exist at [all] stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). This Court, in other words, must make an independent evaluation of appellant's standing at this appellate stage of the case.

sional compensation. He remains free to attempt to influence his colleagues to join him in voting to disapprove any salary increase recommended by the President, or to roll back any previously recommended increase. Since all the established parliamentary procedures are totally available, it is difficult to see how any combination of those procedures can impair what the District Court called (J.S. App. 7a) "the efficacy of Mr. Pressler's vote."

Finally, since the appellant complains only about *increases* in Congressional compensation, not about *decreases or failures to approve increases*, it may be doubted whether he has suffered any direct injury sufficient to confer standing. Cf. *Atkins v. United States*, No. 77-214, and *McCorkle v. United States*, No. 77-486, both pending on petitions for certiorari, where federal judges and federal executives complain about compensation increases that were *not* granted them. The fact that appellant has seen fit to donate "substantially all of his share of the disbursement increased ordered under the Acts since his election to Congress to charity" (J.S. 31), while apparently retaining a small share, indicates that he has personally benefited from the actions to which his complaint is directed.[2] This is not the kind of personal injury in fact – from the standpoint of a Congressman – that is the *sine qua non* of standing. See *Warth v. Seldin*, 422 U.S. 490 (1975).

[2] Appellant states that he "requests injunctive relief only in regard to future disbursements of increases in Congressional salaries that have been authorized under the Salary Act of 1967 and the 1975 Adjustment Act" (J.S. 31). He does not seek "retroactive" relief (*id.*). Thus he intends to keep all past salary increments, including those portions that he voluntarily donated to charities.

(2) **The existence of a political question.** As the District Court acknowledged (J.S.App. 6a, n. 2), if this is an attempt to interfere with the internal workings of Congress "this case might present a political question." Indeed, appellant's own analysis (J.S. 17-20) of the Ascertainment Clause, Article I, Section 6, makes plain that the method of ascertaining Congressional compensation "by Law" has always been a matter textually and totally committed by the Constitution to Congress. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). And the fact that Congress was here acting, in adopting the Salary Act and the Adjustment Act, under the Necessary and Proper Clause of Article I, Section 8, to carry into execution its powers under the Ascertainment Clause only augments the political nature of the question presented by appellant (J.S. 4).

In short, the method by which Congress determines or ascertains its own compensation is totally within the discretion of Congress. It involves the internal workings and voting procedures of the Congress itself, matters which no court can or should control. This, then, is a case involving a political question in the classic sense.

MOTION TO AFFIRM

Alternatively, the appellee Harding moves to affirm the judgment of the three-judge District Court. That court, in Part II of its opinion (J.S.App. 8a-10a), was plainly correct in concluding that neither the Salary Act nor the Adjustment Act contravenes the Ascertainment Clause of the Constitution, Article I, Section 6. Both Acts constitute methods of ascertaining "by Law" the compensation to be received by Members of Congress within the meaning of the Ascertainment Clause; and the court below noted that appellant himself has conceded that when Congress

passed these two Acts governing the ascertainment of its compensation, it acted "by Law" (J.S.App. 8a).

Appellant's entire constitutional argument, accurately described by the court below as being "directed to what is essentially a matter of form rather than substance" (J.S.App. 8a), has been thoroughly canvassed, resolved and even reconsidered on the prior remand. The court's conclusion is so eminently correct that a summary affirmance of its reinstated judgment is in order.

It suffices here to reiterate that, as the District Court recognized (J.S.App. 10a), these Acts are an expression of what Congress deemed "necessary and proper" to carry into execution its exclusive powers under the Ascertainment Clause to fix its own compensation. This great reservoir of discretionary power, conferred on Congress by the Necessary and Proper Clause of Article I, Section 8, was not designed – as appellant would have it (J.S. 29) – to confine Congress to its original selection of modes for ascertaining compensation. Nothing in the language or purpose of the Necessary and Proper Clause, or in the Ascertainment Clause for that matter, precludes an alteration in the modes of ascertaining compensation that had been followed for 178 years. The lesson to be drawn from the Necessary and Proper Clause, as interpreted in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), is that the constitutional founders intended to preserve "a flexible approach to government that would facilitate accommodation to changing conditions and experience" (J.S.App. 10a). And since the assistance of the Executive Branch in executing the Congressional function of salary ascertainment is not prohibited by the Ascertainment Clause or any other provision of the Constitution, Congress may seek such assistance through the Salary Act and the Ad-

justment Act as its current choice of what it deems to be "necessary and proper."

To the extent that appellant's complaint is directed to the "one-House veto" provision of the Salary Act, the complaint has been satisfied by the excision of that provision by the Bartlett amendment of 1977, Public Law 95-19, 91 Stat. 45 (J.S. 5). That amendment, which has no effect on appellant's claims respecting the Adjustment Act, or on his basic misconception respecting the Ascertainment Clause, does operate to blunt much of the alleged importance of appellant's case, with its constant emphasis on seeking "prospective" relief only (J.S. 31). With roll call votes assured for all future quadrennial compensation recommendations under the Salary Act, appellant's concern about the efficacy of his vote respecting such recommendations and the alleged duty of Congressmen to express themselves as to matters of their compensation becomes all the more "a matter of form rather than substance" (J.S.App. 8a).

Disposition of this appeal need not await consideration of the pending petitions for certiorari in two other cases arising under the Salary Act – *Atkins v. United States*, No. 77-214, and *McCorkle v. United States*, No. 77-486.[3] Unlike the appellant here, the petitioning federal judges in *Atkins* and the petitioning federal executives in *McCorkle* are complaining about specific "one-House vetoes" that deprived them of increased compensation under the Salary Act. Appellant, on the other hand, is complaining only about salary increases and determinations that have occurred, or may occur in the future, without the "one-House veto" necessarily having been invoked. And he is

[3] See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cls., 1977); *McCorkle v. United States*, 559 F.2d 1258 (C.A. 4, 1977).

complaining about increases from which he has benefited, or will benefit in the future.

Moreover, neither *Atkins* nor *McCorkle* involves the Ascertainment Clause, which is applicable only to Congressional compensation and which is the central feature of the instant appeal. As appellant himself has stated (J.S. 31), his claim, "like Article I, Section 6 of the Constitution itself, is restricted solely to the question of Congressional salaries," a claim that is obviously not "directly" involved in *Atkins* (J.S. 32). The Ascertainment Clause is simply not at issue in *Atkins* or *McCorkle*, and this appeal can safely be affirmed without awaiting disposition of the petitions in those two cases.

Moreover, appellant has disavowed any claim that his arguments affect the propriety of the Salary and Adjustment Acts "insofar as they create a procedure for determining executive or judicial salaries" (J.S. 31), which of course is the procedure challenged in *Atkins* and *McCorkle*. And appellant has specifically asserted (J.S. 31) that the method of determining non-Congressional salaries under the Acts "is readily severable from the methods for ascertaining Congressional ones." Be that as it may, this assertion suggests another distinguishing factor – that appellant nowhere contends that the legislative veto provisions of the statutes he attacks are severable from the statutory scheme. That the provisions are inseverable was the sole matter decided by the Fourth Circuit in *McCorkle* (559 F.2d 1258) and thus is the controlling issue presented in the *McCorkle* petition in this Court; and the *McCorkle* ruling has injected the severability issue into the *Atkins* proceeding in this Court, by way of a supplement to the petition for certiorari. The severability issue, which may be decisive in this Court's consideration of the *Atkins* and *McCorkle* petitions, thus serves to distinguish still further the instant appeal, where no such issue is presented.

One final note is in order. Much of the significance of this appeal, insofar as it involves any question as to the "one-House veto" provision in the Salary Act, has been dissipated by the repeal of that provision. Much the same can be said about the attacks on that provision in the *Atkins* and *McCorkle* petitions. But the instant appeal is so totally oriented toward prospective relief as to make that repeal almost decisive of the inappropriateness of noting jurisdiction here. In the context of this appeal, no purpose would be served in fully briefing and arguing about a repealed provision or in this Court rendering an advisory opinion as to the constitutionality of a "one-House veto" provision that has no future life.

CONCLUSION

For these reasons, the appeal should be dismissed or, alternatively, the judgment below should be summarily affirmed.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Appellee
Kenneth R. Harding